UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, Jr., KELLY FITZMAURICE, AND HAZEL SINCLAIR Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS Defendant.	File Number: 04-0940 Section: "A" Division: 5 Judge Zainey Magistrate Judge Chasez

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant United States Army Corps of Engineers, by and through its undersigned counsel, hereby moves this Court for an order granting summary judgment on Plaintiffs' claims, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure. The grounds for this motion are set forth in the accompanying Defendant's Memorandum in Support of Its Motion for Summary Judgment and in Response to Plaintiffs' Motion for a Preliminary Injunction.

Respectfully submitted this 22nd day of June, 2004.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

on:

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Attorneys for the Plaintiff, by causing a full, true and correct copy thereof to be sent, on the date set forth below, by mailing in a sealed, first class postage prepaid envelope, addressed to the last known mailing address of the attorney and deposited with the United States Postal Service at Washington D.C.

DATED this 22nd day of June, 2004

Devon M. Lehman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, Jr., KELLY FITZMAURICE, AND HAZEL SINCLAIR	)	
Plaintiffs,	)	
v.	)	File Number: 04-0940 Section: "A" Division: 5
UNITED STATES ARMY CORPS OF ENGINEERS	)	Judge Zainey Magistrate Judge Chasez
Defendant.	)	

DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendant United States Army Corps of Engineers (the "Corps") hereby submits the following statement of facts in connection with Defendant's Motion for Summary Judgment and Memorandum in Support of Defendant's Motion for Summary Judgment and in Response to Plaintiffs' Motion for a Preliminary Injunction, filed herewith.

1. On August 10, 1999, Timber Branch, LLC, and its authorized agent submitted an application for a Section 404 Clean Water Act permit for the discharge of dredged and fill material to the Corps, New Orleans District. Admin. R. (hereinafter "A.R.") at 000010–14.

2. The initial permit application encompassed approximately 91.94 acres of regulation wetlands described as "pine flatwood/savannah wetland," of a total 147.13 acres of the development. Id.

3. On July 31, 2000, the applicant withdrew the initial permit application. Id. at 000445.

4. On September 1, 2000, a revised application for the project was submitted. The applicant's name was changed to August Hand, Jr. The applicant sought a permit for a smaller portion of the tract. The proposed 404 permit sought to dredge and fill 39.54 acres of pine flatwood/savannah wetlands, of a total 81.58 acres of land.

5. On May 16, 2003, the applicant received a water quality certification from the Louisiana Department of Environmental Quality.

6. The Corps issued a Decision Document with an integrated Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) on November 18, 2003. Id. at 000945–1003.

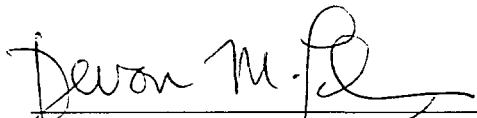
7. On December 18, 2003, the Corps issued a permit under Section 404 of the Clean Water Act (CWA), 33 U.S.C. § 1344. The permit authorized the applicant, August J. Hand, to dredge and fill 39.54 acres of wetlands in the St. Tammany Parish, Louisiana. Id. at 000988–89.

8. On March 4, 2004, the 19th Judicial District Court for the Parish of East Baton Rouge vacated the water quality certification that the Louisiana Department of Environmental Quality had issued to the applicant. Id. at 001004.

9. All material facts are contained in the administrative record submitted in this action.

Respectfully submitted this 22nd day of June, 2004,

THOMAS L. SANSONETTI
Assistant Attorney General
United States Department of Justice



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I hereby certify that I served the foregoing **DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS** on:

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Attorneys for the Plaintiff, by causing a full, true and correct copy thereof to be sent, on the date set forth below, by mailing in a sealed, first class postage prepaid envelope, addressed to the last known mailing address of the attorney and deposited with the United States Postal Service at Washington D.C.

DATED this 22nd day of June, 2004

Devon M. Lehman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, Jr., KELLY FITZMAURICE, AND HAZEL SINCLAIR	)	
Plaintiffs,	)	
v.	)	File Number: 04-0940 Section: "A" Division: 5
UNITED STATES ARMY CORPS OF ENGINEERS	)	Judge Zainey Magistrate Judge Chasez
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

INTRODUCTION

Plaintiffs seek judicial review of a permit issued by the Army Corps of Engineers ("Corps") under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344. The permit authorizes the applicant, August J. Hand, to dredge and fill 39.54 acres of wetlands in the St. Tammany Parish, Louisiana (hereinafter the "Project"). Plaintiffs allege that the Corps violated the National Environmental Policy Act ("NEPA"), by (1) not preparing an Environmental Impact Statement ("EIS") for the permit, and (2) failing to examine the cumulative impacts of the project. Plaintiffs also allege that the 404 permit is invalid because the state water quality certification has been vacated and remanded by the state court.

The Corps hereby moves for summary judgment on Plaintiffs' claims. The Corps fully

complied with NEPA and the CWA and their implementing regulations in issuing a permit to the applicant. The Corps prepared an Environmental Assessment (EA), which examined the environmental impacts stemming from the Project, and decided on the basis of this assessment to issue the applicant a permit. In short, the Corps objectively evaluated the environmental effects of the Project so as to allow a reasoned choice in the decision to permit the Project. Further, the Corps reasonably relied on the state's valid water quality certification in issuing the permit. Accordingly, the Corps is entitled to summary judgment.

In addition, Plaintiffs have not met their burden of demonstrating their entitlement to the extraordinary remedy of injunctive relief. Plaintiffs can not meet any of the requirements necessary for a preliminary injunction. First, Plaintiffs cannot succeed on the merits. Second, Plaintiffs have not shown irreparable injury because the applicant cannot move forward with his development until he complies with state water quality certification and local planning requirements. Third, the balance of harms and public interest weighs in favor of the Corps. This Court, therefore, should deny Plaintiffs' motion for a preliminary injunction.

FACTUAL BACKGROUND

On August 10, 1999, Timber Branch, LLC, and its authorized agent, Thomas K. Brown, submitted an application for a Section 404 Clean Water Act permit for the discharge of dredged and fill material to the Corps, New Orleans District. See Admin. R. (hereinafter "A.R.") at 000010–14. The applicant proposed to "clear, grade, excavate, and maintain fill for a residential development consisting of 268 home sites, including roads, driveways, house pads, utilities, etc." Id. at 000014. The initial permit application encompassed approximately 147.13 acres, of which 91.94 acres were regulated wetlands, described as "pine flatwood/savannah wetland." Id. The

applicant stated that "wetlands areas will be mucked out and refilled with trucked-in sandy clay to facilitate home site and road development." Id. The applicant also proposed to "install (a) low level berm along Timber Branch to detain storm water run off and attempt to create wetlands in non-wet terrace floodplain. . . . Subdivision will be built in 3 phases over a projected 7-year period." Id.

On September 3, 1999, the Corps and the Louisiana Department of Environmental Quality ("LDEQ") placed a joint public notice for the proposed project and permit application. Id. at 000024–38. In addition to a Section 404 CWA permit, the applicant needed to obtain a Water Quality Certification from the State of Louisiana, pursuant to Section 401 of the CWA. After the public notice, the agencies received comments from various federal and state resource agencies and interested parties. On November 5, 1999, the Corps forwarded the comments to the applicant for the applicant's review and comment. Id. at 000088–91. The Corps also asked the applicant to address several issues, including demonstrating the need for the proposed subdivision in the Covington area, providing a mitigation plan for unavoidable wetlands impacts, and addressing the secondary impacts likely to occur and the expected extent of the impacts. Id.

The Corps did not receive a response within thirty days and consequently returned the application to the applicant. Id. at 000098. Subsequently, on April 7, 2000, the applicant provided a response to the Corps. Id. at 000106. The applicant provided a site plan for the tract, calling for the development of approximately 90 acres of wetlands. Id. at 000113, 000133. The applicant also addressed public comments and provided materials in response to the issues raised by the Corps. Id. at 000113–000132.

On July 31, 2000, the applicant withdrew the initial permit application. Id. at 000445.

On September 1, 2000, a revised application for the project was submitted. Id. at 000446. The applicant's name was changed to August Hand, Jr., and, on October 27, 2000, Solutions, Inc. became the authorized agent for Mr. Hand. Id. at 000447. Through a series of discussions with the Corps, the application was eventually revised as to the scope of the area and wetlands to be impacts. The applicant sought a permit for a smaller portion of the tract. The applicant supplied information and revised drawings whereby the area affected by the 404 permit would be over what was termed Phase I of Timber Branch II. Id. at 000484. This area was 81.58 acres of land in total, 39.54 acres of which were pine flatwood/savannah wetlands. Id.

On August 29, 2001, the Corps and the LDEQ issued a second public notice for the permit application. Id. at 000484. The new map submitted with the application and public notice indicated the reduced scope of the application. Id. at 000484--508. The LDEQ stated that the applicant would need a valid water quality certification from the state. Id. at 000607. Comments were also received from the following groups and individuals: U.S. Fish & Wildlife Service, id. at 000601; EPA, id. at 000646; Gulf Restoration Network, id. at 000603; Mississippi River Basin Alliance, id. at 000609; Louisiana Audubon Council, id. at 000611; Diane Casteel, id. at 000613; Sierra Club, id. at 000614; Hazel Sinclair, id. at 000639; Lake Pontchartrain Basin Foundation, id. at 000616; and Tulane Environmental Law Clinic, id. at 000622. Each of these commenters objected to the permit application and raised the following issues: (1) piecemealing or improper segmenting; (2) existence of practicable, non-wetland sites; (3) the need to assess the cumulative impacts of development of the larger tract and similar past, present, and future development in the Parish; (4) increased risk of flooding; (5) impact on designated scenic water bodies; (6) loss of wetlands; and (7) failure of the application to meet the "public interest." Id.

The applicant's agent responded to these comments in a letter dated January 21, 2002. Id. at 000651–71.

The LDEQ water quality certification was received on May 16, 2003. Id. at 000708. No Louisiana coastal zone management consistency determination was required because the proposed project was outside of the coastal zone. The applicant did receive a permit from Louisiana pursuant to the Louisiana Scenic Rivers Act, which was later suspended due to inactivity. Id. at 000716–17.

On November 18, 2003, the Corps of Engineers issued a decision document with an integrated EA and finding of no significant impact ("FONSI"). Id. at 000945–1003. The Corps determined that for the proposed development, there would not be a significant impact on the environment in light of the various mitigation measures that the applicant was required to take under the conditions of the permit and in accordance with the applicable state and local law. Id. at 000982. On December 18, 2003, the Corps issued a 404 permit to Mr. Hand, permitting construction in 39.535 acres of jurisdictional wetlands. Id. at 000985–000989. Conditions applicable to the permit and permittee were as follows:

(a) any additional work would be subject to separate approval by the Corps;

(b) the permittee was required to take measures to prevent, during construction, any eroding material from entering wetlands and adjacent waterways;

(c) the permittee was to comply with Parish floodplain ordinances, regulations, and permits to assure maintenance of floodwater storage capacity at the site and to avoid disruption of drainage patterns;

(d) a scenic river permit was required from the Louisiana Department of Wildlife and Fisheries;

(e) the permittee was required to place a state conservation servitude on lands within the 100

foot buffer zone along the Timber Branch. The servitude was to be filed by the permittee with the property records for St. Tammany Parish, with a number of restrictions on use of the buffer zone lands as part of the servitude; and

(f) the permittee would compensate for impacts to wetlands by acquiring 47.5 acres of pine flatwood/savannah wetlands through the Louisiana Nature Conservancy.

Id. at 000988–89.

The same parties who are plaintiffs in this case challenged in state court LDEQ's issuance of a 401 certification. On February 9, 2004, the 19th Judicial District Court for the Parish of East Baton Rouge heard argument, and, on March 4, 2004, it vacated the 401 certification and remanded the matter to LDEQ "to prepare an environmental analysis in compliance with La. Const. Art. IX § 1 . . ." Id. at 001004. LDEQ has not yet completed the required analysis.

Mr. Hand is prohibited by state law from going forward with his proposed development until a new state certification is issued. LA RS 30:2075. In addition, Mr. Hand has numerous local planning requirements yet to fulfill. The St. Tammany Parish has a lengthy list of ordinances that are applicable to this development. See St. Tammany Parish Code of Ordinances. Accordingly, until these issues are resolved, work on the project may not begin.

STATUTORY AND REGULATORY BACKGROUND

A. NATIONAL ENVIRONMENTAL POLICY ACT

The purpose of NEPA, 42 U.S.C. §§ 4321, et seq., is to focus the attention of the federal government and the public on a proposed action so that the consequences of the action can be studied before the action is implemented and potential negative environmental impacts can be avoided. Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 371 (1989). Regulations promulgated by the Council on Environmental Quality (CEQ), 40 C.F.R. §§ 1500-1508, provide

guidance in the application of NEPA. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). As NEPA does not contain an independent waiver of sovereign immunity, a NEPA challenge must be brought pursuant to the Administrative Procedures Act. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882-883 (1990).

NEPA's mandate to the agencies is "essentially procedural . . . It is to insure a fully informed and well-considered decision . . . ." Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particular result." Spiller v. White, 352 F.3d 235, 238 (5th Cir. 2003) (citing Robertson, 490 U.S. at 350); see also Dep't of Transp. v. Pub. Citizen, __ S. Ct. __, 2004 WL 1237361 *4 (June 7, 2004).

NEPA requires federal agencies to consider the environmental impact of any major federal actions they undertake and to prepare EISs for all "'major federal actions significantly [affecting] the quality of the human environment.'" Spiller, 352 F.3d at 237 (quoting 43 U.S.C. § 4332(2)(C)). CEQ regulations allow agencies to prepare EAs if the agency's proposed action would not clearly require the production of an EIS. See Pub. Citizen, 2004 WL 1237361 *5. "The EA is to be a 'concise public document' that 'briefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS].'" Id. "Thus, the ultimate purpose of the EA is to lead to one of two findings: 'either that the project requires the preparation of an EIS to detail its environmental impact, or that the project will have no significant impact . . . necessitating no further study of the environmental consequences which would ordinarily be explored through an EIS.'" Spiller, 352 F.3d at 238.

"An agency's decision not to prepare an EIS can be set aside only upon a showing that it

was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" Pub. Citizen, 2004 WL 1237361 *8 (quoting 5 U.S.C. § 706(2)(A)). "The law only requires that an EA be a 'rough-cut,' 'low-budget,' preliminary look at the environmental impact of a proposed project." Spiller, 352 F.3d at 240 (quoting Sabine River Auth. v. U.S. Dep't of Interior, 951 F.2d 669, 677 (5th Cir. 1992)); see also Sierra Club v. Espy, 38 F.3d 792, 802–03 (5th Cir. 1994) (describing EA as "rough-cut, low-budget environmental impact statement intended to determine whether environmental effects are significant enough to warrant preparation of an EIS"). NEPA requires that plaintiffs themselves must bear the evidentiary burden of showing that an agency acted arbitrarily in preparing a particular EA. In doing so, plaintiffs must submit detailed and conclusive evidence, not speculation. Kleppe v. Sierra Club, 427 U.S. at 412–414; see also Enos v. Marsh, 769 F.2d 1363, 1367, 1373 (9th Cir. 1985); Lower Alloways Creek Tp. v. Public Serv., 687 F.2d 732, 740–741, 743, 747–748 (3rd Cir. 1982) (plaintiffs cannot submit arguments under NEPA, allegedly resting on "common sense" only, without substantiating them with detailed evidence).

An agency's decision to forgo preparation of an EIS may be justified, even in the presence of adverse environmental impacts, if the agency adopts mitigation measures in response to identified impacts. See, e.g., Tillamook County v. U.S. Army Corps of Eng'rs, 288 F.3d 1140, 1144 (9th Cir. 2002) (citing Wetlands Action Network v. U.S. Army Corps of Eng'rs, 222 F.3d 1105, 1121 (9th Cir. 2000)). The Fifth Circuit has recently approved the use of a "mitigated FONSI": a situation that occurs "when an agency or an involved third party agrees to employ certain mitigation measures that will lower the otherwise significant impacts of an activity on the environment to a level of insignificance." Spiller, 352 F.3d at 241. If mitigation features reduce

the risk of environmental impacts to a level where they are considered insignificant, the agency is not required to prepare an EIS. Id.

The agency is entitled to considerable deference in the Court's consideration of whether it complied with NEPA. A party bringing suit under NEPA "face[s] a high bar to success . . . as NEPA-related decisions are accorded a considerable degree of deference." Spiller, 352 F.3d at 240. In reviewing NEPA decisions, the Court must uphold the agency's determination unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see also Marsh, 490 U.S. at 375 n. 21. "Under this 'highly deferential' standard, a reviewing court has the 'least latitude in finding grounds for reversal' of an agency decision and 'may not substitute its judgment for that of the agency.'" Spiller, 352 F.3d at 240 (quoting Sabine River, 951 F.2d at 678). Thus, the Court should review the agency's action only to determine whether the agency took a "hard look" at the environmental consequences of the action; it should not "interject [itself] within the area of discretion of the agenc[y] as to the ultimate choice of the action to be taken." Id. (quoting Kleppe, 427 U.S. at 410 n.21).

B. CLEAN WATER ACT

The Clean Water Act ("CWA") prohibits the discharge of dredged and fill materials into navigable waters, including wetlands, without a permit. Section 301 includes a general prohibition against the discharge of "pollutants" without a permit, 33 U.S.C. § 1311, section 502 defines "pollutant" to include dredged and fill materials, Id. at § 1362(6); section 502 also defines "discharge of a pollutant" to include the addition of any pollutant to navigable water. Id. at 1362(12). Corps regulations define "navigable waters" to include wetlands. 33 C.F.R. Part 328; see also Tull v. United States, 481 U.S. 412, 414 (1987).

Section 404 of the CWA authorizes the Army Corps of Engineers ("Corps") to issue permits for the discharge of dredged or fill materials into navigable waters. Id. at § 1344. The statute also requires, however, that before the Corps may issue such a permit, the permit applicant must supply to the Corps "a certificate from the state[1]/ in which the discharge originates or will originate . . . that any such discharge will comply with" applicable provisions of the statute. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). Moreover, the statute requires that states "establish procedures for public notice" as part of the certification process, and that if the state "fails or refuses to act on a request for certification, within a reasonable period (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application." Id. Finally, the subsection states that no permit may be granted until a certification has been granted or waived, and that no certification may issue if the state denies the certification request. Id.

STANDARD OF REVIEW

A. Administrative Procedure Act

Plaintiffs' NEPA and CWA challenge is governed by the Administrative Procedure Act's (APA's) standard of review for informal agency adjudications; whether the action was "arbitrary, capricious, or otherwise not in accordance with law." See 5 U.S.C. § 706; Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). This APA standard of review is a narrow one whereby the court is not empowered to substitute its judgment for that of the agency. Marsh, 490 U.S. at 378; Gilbert v. Nat'l Transp. Safety Bd., 80 F.3d 364, 368 (9th Cir. 1996). The Court is

[1]/ In some cases a certification from an interstate agency may be required. 33 U.S.C. § 1341(a)(1). Where a state or interstate agency has no authority to issue such a certification, it must come from the Administrator of EPA. Id.

not to determine whether it would make an administrative decision differently; instead, it is to evaluate whether "the decision was based on the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416; City of Alexandria v. Fed. Highway Admin., 756 F.2d 1014, 1017 (4th Cir. 1985). Furthermore, judicial review is focused upon the administrative record before the agency at the time the decision is made. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985). An agency deserves an extra measure of deference with regard to factual questions involving scientific matters in its area of expertise. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 103 (1983); Federal Power Comm'n v. Florida Power & Light Co., 404 U.S. 453, 463 (1972).

B. Summary Judgment

Summary judgment is appropriate when "there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." See F.R.C.P. 56; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Liberty Lobby, 477 U.S. at 247–48. The moving party is entitled to judgment as a matter of law if the nonmoving party fails to make a sufficient showing on an essential element of its case. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). Because the court need not and, indeed, may not, "find" underlying facts, there are no material facts essential to the court's resolution of this action. See, e.g., Celotex, 477 U.S. at 322; Nat'l Wildlife Fed., 497 U.S. at 883. Because an administrative review proceeding, such as this one, does not implicate the possibility of a trial, if the court were to conclude from a review of the Corps' administrative record that the agency's decision was

arbitrary or capricious, the remedy would be to remand the matter for reconsideration. Vermont Yankee, 435 U.S. at 549; Camp v. Pitts, 411 U.S. 138, 143 (1973).

C. Preliminary Injunction

"A preliminary injunction 'is an extraordinary and drastic remedy, not to be granted routinely, but only when the movant, by a clear showing, carries a burden of persuasion.'" Black Fire Fighters Ass'n of Dallas v. City of Dallas, Tex., 905 F.2d 63, 65 (5th Cir. 1990) (quoting Holland Am. Ins. Co. v. Succession of Roy, 777 F.2d 992, 997 (5th Cir.1985)); Kern River Gas Transmission Co. v. Coastal Corp., 899 F.2d 1458, 1462 (5th Cir. 1990). In order for this Court to grant Plaintiffs' motion for a preliminary injunction, Plaintiffs must satisfy each of four criteria: (1) substantial likelihood of success on the merits; (2) irreparable harm; (3) a favorable balance of hardships; and (4) no adverse effect on the public interest. Black Fire Fighters, 905 F.2d at 65; Kern, 899 F.2d at 1462. Plaintiffs' failure to carry the burden on any one of the four criteria requires this Court to deny Plaintiffs' motion. Black Fire Fighters, 905 F.2d at 65; Kern, 899 F.2d at 1462.

ARGUMENT

In this case, Plaintiffs have failed to show the Corps' decision is arbitrary, capricious, or otherwise not in compliance with law. Therefore, the Corps is entitled to summary judgement on Plaintiffs' claims. Moreover, Plaintiffs are unable to carry their burden as to any of the four elements necessary for a preliminary injunction and, therefore, their motion must be denied.

A. Summary Judgment Should be Granted in Favor of Defendant.

1. The Corps Fully Complied With NEPA By Taking a "Hard Look" at the Project.

The Corps is entitled to summary judgment in this case because it fully complied with NEPA requirements by taking a "hard look" at the Project. Plaintiffs base their NEPA claims upon two contentions: (1) NEPA required the Corps to prepare an EIS; and (2) the Corps failed to consider the cumulative impacts of the Project. Pls.' Mem. in Supp. of Pls.' Mot. for Prelim. Inj. (hereinafter "Pls.' Br.") at 7–12. These claims are without merit because the Corps fully complied with NEPA in its issuance of an EA. Further, the EA adequately addressed the cumulative impacts of the Project.

a. The Corps' Decision Not to Prepare an EIS was Reasonable.

The Corps acted reasonably in issuing an EA and not preparing an EIS. The Corps undertook a thorough analysis of the Project and concluded that, with appropriate mitigation, the Project would not have a significant impact on the human environment. See A.R. at 000963–965. Accordingly, the Corps issued a mitigated FONSI. Plaintiffs contend that NEPA required the Corps to issue an EIS because the Project will have a significant impact on the environment. Pls.' Br. at 7–10. Specifically, Plaintiffs allege that (1) the Corps' Decision Document indicates that the Project will have a significant impact on the environment, (2) the Project will increase traffic in the area, and (3) there is a risk of increased flooding in the area. Id.

Plaintiffs contend that the Corps' decision document supports a finding that the Project will have a significant impact on the environment and, accordingly, the Corps was required to

prepare an EIS. Plaintiffs ignore that the Corps' EA/Decision Document found that ***with appropriate mitigation*** the Project would not have a significant impact on the human environment. See A.R. 000957, 000960, 000963–64. The record shows that the Corps fully complied with NEPA in basing the FONSI on mitigation measures designed to lower the environmental impacts to an insignificant level. See Spiller, 352 F.3d at 239, 241. The applicant is being required to mitigate the impacts of the Project on the loss of wetlands by including a buffer zone over which a conservation servitude in perpetuity will be placed, and acquiring similar wetlands through the Louisiana Nature Conservancy, an established mitigation bank. A.R. at 000953, 000956, 000988. While the Project otherwise may have had an impact on local flooding, that impact is being mitigated by the applicant through the local government — St. Tammany Parish — and in the development and approval of drainage plans that comply with local development ordinances. Id. at 000954–55. Further, while there may otherwise be local impacts in vehicular traffic, water quality, and in sewerage, these are also matters within the control of state and local authorities that are addressed and mitigated through the permittee's compliance with the state and local laws. Id. at 000953–89. In short, whatever impacts there may otherwise have been are being compensated for and mitigated through a host of measures. Accordingly, the Corps reasonably determined that the Project would not have significant environmental impacts and that an EIS was not necessary. Accordingly, the Corps' decision not to prepare an EIS is entitled to deference and should be upheld. See Baltimore Gas, 462 U.S. at 93, 101, 103.

b. The Corps Adequately Analyzed the Cumulative Impacts of the Project

The Corps also fully analyzed the cumulative impacts of the Project in its Decision Document. Plaintiffs allege that the Corps failed to analyze the impacts of this project in light of the other two phases of the Project, which Plaintiffs allege are "reasonably foreseeable" future actions. Pls.' Br. at 11. Plaintiffs further argue that NEPA requires the Corps to analyze this Project in light of the other projects being permitted in Louisiana. Id. at 11–12.

The CEQ regulations provide that agencies should consider the cumulative impact of a proposed action. 40 C.F.R. § 1508.27(b)(7). CEQ defines "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . ." 40 C.F.R. § 1508.7. "[C]losely related and proposed or reasonably foreseeable actions that are related by timing or geography also must be considered together." Vieux Carre Prop. Owners, Residents & Assoc., Inc. v. Pierce, 719 F.2d 1272, 1277 (5th Cir. 1983). The agency is entitled to great deference in determining "the extent and interrelationship among proposed actions and practical considerations of feasibility." Kleppe, 427 U.S. at 412.

(i) The Corps Acted Reasonably in Not Analyzing Further Speculative Stages of the Project.

Plaintiffs argue that "the Corps failed to analyze the impacts of this project in light of the impact that will result from the other two phases of the project." Pls.' Br. at 11. This contention is unavailing because the record indicates that the permit application before the Corps was for the discrete project that the Corps analyzed. Through a series of discussions, the Corps and the applicant narrowed the applicant's original three-phase application as to the scope of both the

area and the wetlands to be impacted. Accordingly, the permit application at issue is for construction in 39.54 acres of pine flatwood/savannah wetlands, out of a total 81.58 acres proposed for development. The record reflects that the current project is a stand-alone project and the other phases are not planned at this time and may never be built.

Courts use an independent utility test to determine whether a property has been improperly segmented. See, e.g., Native Ecosystems v. Dombeck, 304 F.3d 886, 894 (9th Cir. 2002); Soc'y Hill Towers Owners' Assoc. v. Rendell, 210 F.3d 168, 182 (3d Cir. 2000); Airport Neighbors Alliance, Inc. v. United States, 90 F.3d 426, 433 (10th Cir. 1996). "Where each of the projects would have (or could have) taken place with or without the other, each has 'independent utility' and the two are not considered connected actions." Id. In this case, the proposed Project for which the Corps issued a permit has independent utility.

This case is analogous to Vieux Carre. In Vieux Carre, a developer had submitted a previous application including two phases — Phase II and Phase III — of a project in its project description. 719 F.2d at 1276–77. That application was withdrawn because there was no firm financial commitment for Phase III, and the developer later submitted an application that included only Phase II. Id. The plaintiffs in Vieux Carre argued that the city's environmental assessment was inadequate because it considered only Phase II and that the developer omitted Phase III in order to avoid environmental scrutiny. Id. at 1277. In upholding the city's EA, first, the court noted that "all indications are that plans for Phase III and other future phases have been shelved for economic and other reasons." Id. The court went on to hold that Phase II was designed to stand alone and, accordingly, the city's EA was properly restricted to Phase II. Id. at 1278. "Confronted with a project that had independent utility, the City properly determined that

it should be assessed independently of future speculative phases." Id.

The case at bar is analogous to Vieux Carre and this Court should likewise hold that the Corps properly restricted its EA to the permit application before it. Plaintiffs' argument was made before the Corps by parties, including plaintiffs, in comments submitted to the Corps pursuant to the public notice issued. See id. at 000603–48. The Decision Document contains a well-reasoned response by the Corps. Id. at 000976. There is no indication in the administrative record or otherwise — other than pure speculation — that the applicant reduced the scope of the Project in order to avoid environmental review. The Decision Document notes that the current Project is a minimization of the previously submitted scope of work. A.R. at 000947, 000974. The Decision Document also notes that any future phases of the Project would depend on whether the Project at bar is successful. Id. at 000965. Accordingly, the administrative record supports the agency's finding that future phases are speculative at this point and are dependent on the success of the initial phase. In addition, the Corps explicitly found that the Project at bar had independent utility:

> The other referenced works (Phases II and III of residential development and an unidentified commercial phase) do not need to be constructed for implementation of the subject "Phase I." While similar in nature, the subject project is not dependent on the other(s) to accomplish the overall project purpose of providing residential housing (i.e., the subject project has independent utility).

Id. at 000976. Plaintiffs have not shown any evidence that Phase I can only be accomplished by the implementation of future speculative phases of the Project. Accordingly, the Corps reasonably restricted its consideration to the permit application before it.

Moreover, if the applicant eventually chooses to apply for a permit for future phases of the development, a new review will be conducted. Special Condition 7 in the Permit notified the

applicant that any additional work not permitted in the Permit itself would require separate approval from the Corps. Id. at 000988. Any cumulative impacts of future phases would be evaluated at that time. Further, the Corps would evaluate those permit applications with consideration of additional impacts in the watershed that may occur during before any new proposals are submitted. Id. at 000965. Mitigation might also be required at that time. Id. at 000976.

(ii) The Corps Fully Analyzed the Cumulative Impacts of Other Development.

As noted, the CEQ regulations require the Corps to address the cumulative impacts resulting from the proposed project combined with "other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. Plaintiffs argue that the Corps failed to examine the cumulative impacts of this project because the proposed project site is located in the most rapidly developing parish in Louisiana. Pls.' Br. at 11–12. Notably, Plaintiffs do not point to any particular action that was foreseeable and therefore should have been considered in the Corps' EA. Rather, Plaintiffs' attack is a broad-based one, focusing on other development in the St. Tammany Parish and, indeed, the state. Plaintiffs' argument must fail, however, because the Corps took a "hard look" at the cumulative effects of the Project.

The administrative record shows that the Corps fully considered the cumulative impacts of the proposed project along with other development in the area. See A.R. at 000964–65. The Decision Document mentions the number of permits granted within a 1-mile radius and a 3-mile radius of the project site. Id. The Decision Document also notes the compensatory mitigation required as special conditions of those permits. Id. In particular, the Decision Document notes

that "when considered in conjunction with the potential for additional tentative phases of this development, and historical development and land use practices, the cumulative effects may become major." Id. The Corps found, however, that "[m]itigation for impacts caused by the proposed project, possible future project phases, and all Corps permitted projects will remove or reduce e[x]pected impacts." Id. Therefore, the record indicates that the Corps fully analyzed the cumulative effects of the Project in light of the development of the Parish as a whole and found that, with the compensatory mitigation for wetlands impacts, there were not significant environmental impacts. In short, the Corps complied with NEPA by examining the direct, indirect, and cumulative effects of this Project, combined with other past, present, and reasonably foreseeable future projects, and issuing a mitigated FONSI.

In essence, Plaintiffs seek to have the agency perform a study akin to a local land-use-planning guide. This is not the purpose of NEPA. The NEPA process "'was not intended to be a substitute community planning device.'" Isle of Hop Historical Ass'n v. U.S. Army Corps of Eng'rs, 646 F.2d 215, 221 (5th Cir. 1981) (quoting Concerned About Trident v. Rumsfeld, 555 F.2d 817, 829 (D.C. Cir. 1976)); see also Fritiofsen v. Alexander, 772 F.2d 1225, 1248 (5th Cir. 1985) (abrogated on other grounds by Sabine, 951 F.2d at 677–78) (noting that NEPA is not intended to serve as a local zoning or land-use-planning guide).

In short, Plaintiffs disagree with the decision the Corps made. This Court's review, however, is limited to an examination of whether the Corps followed the process prescribed by NEPA and took a "hard look" at the impacts of its proposed action. The administrative record shows that the Corps did so in the case at bar.

2. Plaintiffs Have Not Raised Any Material Dispute Under the CWA.

Plaintiffs assert they are likely to succeed on the merits of their claims under the Clean Water Act because several months after the Corps issued the 404 permit, in reliance on the state's 401 certification, the state court vacated that certification. Pls.' Br. at 12–14. According to Plaintiffs, "The Corps' reliance on an invalid water quality certification violates the Clean Water Act." Id. at 14. Plaintiffs misconstrue the CWA, however, and, as a matter of law, they cannot succeed on the merits of this claim.

First, review of Plaintiffs' CWA claim is under the APA. See Compl. ¶ 5. To be entitled to relief, therefore, Plaintiffs must show that the Corps' issuance of the permit was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Accordingly, in order to succeed on the merits of this claim or even raise a genuine issue of material fact, Plaintiffs must demonstrate that the Corps was somehow arbitrary and capricious, based on the record before it at the time it issued the 404 permit, in relying on the validity under state law of LDEQ's certification under section 401.

Case law and the Corps's longstanding regulations and policies make clear, however, that the Corps is entitled to rely on the validity of a certification issued by a state. Any other result would require the Corps to second-guess a state's application of its own laws, something prohibited by the "vigorous federalism underlying the Clean Water Act." See United States v. Homestake Mining Co., 595 F.2d 421, 429 (8th Cir. 1979).

The District of Columbia Circuit has expressly addressed the lack of obligation of a federal agency to "look behind" a state certification to assess its validity. In a case addressing the ability of a federal agency to recognize an attempt by a state to withdraw a certification in a

manner that did not comply with the Clean Water Act, the D.C. Circuit stated:

> Nor do we doubt the propriety of a federal agency's refusal to review the validity of a state's decision to grant or deny a request for certification in the first instance, before any federal license or permit has yet been issued. Such a decision presumably turns on questions of substantive state environmental law – an area that Congress expressly intended to reserve to the states and concerning which federal agencies have little competence.

Keating v. FERC, 927 F.2d 616, 622 (D.C. Cir. 1991).

The District Court for the Northern District of Ohio also has recently held that an agency may not second-guess a state certification. In City of Olmstead Falls v. EPA, 266 F. Supp. 2d 718, 721 (N.D. Ohio 2003), a case very similar to this one, the Ohio Environmental Protection Agency ("OEPA") notified the Corps that it chose to waive its 401 certification for an airport project. Thereafter, the Corps issued a 404 permit for the project. The City of Olmstead Falls, however, challenged OEPA's waiver to the Ohio Environmental Review Appeals Commission, which held that the state's waiver was in violation of state law. Id. Olmstead Falls then sought to have the Corps revoke the 404 permit, but the Corps declined to do so. Id.[2]/ In holding that the Corps' issuance of the 404 permit was not improper, the court explained:

> There is no explicit or implicit requirement on the part of the Corps Defendants to ensure that the state's certification process complies with the state's own guidelines, including the authority of the state to issue a waiver. To do so would place an undue burden on the Corps and would ultimately allow the Corps to challenge or override the state's certification process and substitute its own judgment for that of the state agency charged with administering Section 401 certifications. In this case, it is undisputed that the Corps Defendants received an express waiver from the Director of OEPA waiving Ohio's right to act on Cleveland's Section 401 Application. This Court finds that as a matter of law, the

[2]/ After the City of Olmstead Falls filed the motion before the N.D. Ohio, the Ohio Court of Appeals for the for the 10th Circuit reversed the appeals board's ruling, finding that the plaintiff did not have standing. 266 F. Supp. 2d at 721. The City continued to seek a revocation of the Corps' 404 permit, however, in part based on the illegality of the waiver under state law.

> Corps Defendants cannot be liable for relying on the waiver issued by the Director of OEPA, even if it is ultimately determined that the Director lacked authority under Ohio law to issue the waiver.

266 F. Supp. 2d at 726–727 (footnote omitted); see also Am. Rivers, Inc. v. FERC, 129 F.3d 99. 110–11 (2d Cir. 1997) (agency "does not possess a roving mandate to decide that substantive aspects of state-imposed conditions are inconsistent with § 401.")

These holdings are consistent with Corps guidance, which provide that where a state seeks to "deny or further condition" a certification after a 404 permit has been issued, "the engineer is not required to revoke or modify the permit, but may consider if modification, suspension, or revocation might be appropriate in accordance with 33 C.F.R. § 325.7." RGL 87-03. Moreover, if a state seeks to "void" a certification after the Corps has issued a permit in reliance on the certification, "that court action does not affect the validity of the Corps permit." Id. Again, the guidance gives the engineer discretion in those circumstances to consider whether modification, suspension, or revocation is appropriate. Id.; see also Letter from B.N. Goode, Chief, Regulatory Branch, U.S. Army Corps of Engineers, to John H. Tait (Mar. 10, 1989) ("If a state 'decertifies' a general or individual permit after the Corps has issued the permit in good faith reliance on the original certification, the Corps does not recognize an obligation to revoke the Corps permit but may elect to modify or revoke the permit at its own discretion....") (cited in Keating, 927 F.2d at 623 n. 4).

Accordingly, the state court's decision regarding the 401 certification in this case does not render the 404 permit invalid, and the Corps was not unreasonable in relying on the validity of that certification. Plaintiffs cannot succeed on the merit of this claim and the Corps is entitled to judgment as a matter of law.

B. Plaintiffs Cannot Meet the Requirements for Issuance of a Preliminary Injunction.

Plaintiffs also have failed to show that they can meet the requirements for the issuance of a preliminary injunction, and their Motion in that regard must be denied. For the reasons described above in support of Defendant's motion for summary judgment, Plaintiffs have not shown that they are likely to succeed on the merits. Even if this Court finds that the Plaintiffs have shown some likelihood of success on the merits, the Court is not required to issue an injunction. The Supreme Court has consistently held that an injunction is a matter within the Court's equitable discretion and that it is not a remedy which issues as of course or to restrain an act the injurious consequences of which are merely trifling or have not been demonstrated. Under those precedents, an injunction should issue only where intervention of a court of equity is essential in order to protect property rights against injuries otherwise irremediable, and courts of equity are directed to "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." Weinberger v. Romero-Barcelo, 456 U.S. 305, 311–12 (1982). Here, an agency of the Federal Government after a careful process, which includes obtaining the comments of several other federal and state environmental agencies, has issued a permit to the applicant. The issuance of an injunction to prevent that process from going forward will have undoubted consequences, including significant financial impositions, upon the public. Plaintiffs have made no showing that any interest of theirs is entitled to greater weight or consideration and accordingly, the Injunction sought in this case at this time must be denied.

Further, for the following reasons, Plaintiffs cannot meet the other requirements necessary for the issuance of a preliminary injunction:

1. Plaintiffs Have Not Shown Irreparable Injury

Plaintiffs must show that irreparable injury will occur in the absence of the issuance of an injunction. The burden of justifying interim relief lies with the movant, and threatened, speculative harm does not amount to irreparable injury for purposes of justifying an injunction. Nat'l Wildlife Fed. v. Burlington N. R.R., Inc., 23 F.3d 1508, 1512 (9th Cir. 1994).

There is little risk of irreparable harm if this Court does not issue an injunction. The applicant cannot go forward with the development until several conditions are met. First, the applicant must obtain a valid water quality certification. See LA RS 30:2075 ("No person shall conduct any activity which results in the discharge of any substance into the waters of the state without the appropriate permit, variance, or license required under the regulations of the department adopted pursuant to this Chapter.") Second, he must obtain approval from the St. Tammany Parish Planning Commission. See St. Tammany Parish Code of Ordinances, Subdivision Regulatory Ordinance No. 499; St. Tammany Parish Code of Ordinances, Land Use523, Section 2.09 PUD Planned Unit Development District. Currently, the applicant has tentative approval from the St. Tammany Parish Council, which he obtained on May 6, 2004. The tentative approval means that the applicant has to submit development plans to the Planning Commission for a preliminary review of development plans and receive preliminary approval of the development and have a work order issued by the Commission. See St. Tammany Parish Code of Ordinances, Subdivision Regulatory Ordinance No. 499 at Section 40.050.0(3) (Tentative Subdivision Review). This is done during regularly scheduled Planning Commission meetings. When the owner brings the matter up to the commission is at his discretion, so long as it occurs sometime within two years from the date of tentative approval. Id. at Section

40.050.0(5). The next meeting is on July 13, 2004. Without this approval, the applicant cannot start any construction. See St. Tammany Parish Code of Ordinances, Subdivision Regulatory Ordinance No. 499 at Section 40.060.0 (Preliminary Subdivision Review). Accordingly, there is no danger of immediate development at the site.

2. The Balance of Injuries Tips In Favor of Defendants; An Injunction Would Disserve the Public Interest

In this case, Plaintiffs, who bear the burden of proof, have not shown that there will be a danger of irreparable injury before the Court can hear the case on the merits. Accordingly, the balance of the injuries in this case tips in favor of the Corps and the public interest. There is no presumption of harm where plaintiffs allege a violation of environmental statutes. Amoco Prod. Co. v. Village of Gamble, Alaska, 480 U.S. 531, 545 (1987). The public interest standard is a separate consideration in determining whether to grant equitable relief. Amoco, 480 U.S. at 545; Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 625-26 (5th Cir. 1985). When injunctive relief would harm the public interest, the Court may withhold the relief, even if doing so would burden or cause irreparable injury to the movant. Romero-Barcelo, 456 U.S. at 312-313; Endangered Species Committee v. Babbitt, 852 F. Supp 32, 42 (D.D.C. 1994); Yakus v. United States, 321 U.S. 414, 440 (1944).

CONCLUSION

For the foregoing reasons, the Court should grant the Corps' motion for summary judgment and deny Plaintiffs' motion for a preliminary injunction.

Respectfully submitted this 22nd day of June, 2004,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND IN RESPONSE TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION** on:

Josh Borsellino, Student Attorney
Karla Raettig
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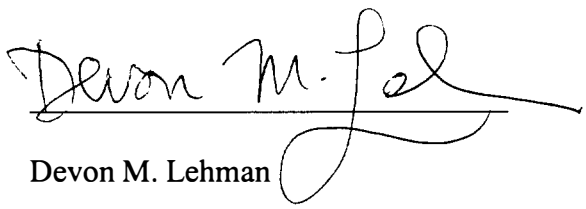
6329 Freret Street
New Orleans, Louisiana 70118

Attorneys for the Plaintiff, by causing a full, true and correct copy thereof to be sent, on the date set forth below, by mailing in a sealed, first class postage prepaid envelope, addressed to the last known mailing address of the attorney and deposited with the United States Postal Service at Washington D.C.

DATED this 22nd day of June, 2004



Devon M. Lehman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LORETTO O'REILLY, Jr., KELLY FITZMAURICE, AND HAZEL SINCLAIR	)	
Plaintiffs,	)	
v.	)	File Number: 04-0940 Section: "A" Division: 5
UNITED STATES ARMY CORPS OF ENGINEERS	)	Judge Jay C. Zainey Magistrate Judge Alma L. Chasez
Defendant.	)	

NOTICE OF HEARING

TO: Josh Borsellino, Student Attorney
Karla Raettig, Esq.
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New Orleans, Louisiana 70118

PLEASE TAKE NOTICE that the foregoing Defendant's Motion for Summary Judgment will be brought on for hearing on the 28th day of July, 2004, at 9:00 a.m. before the Honorable Jay C. Zainey, United States District Judge, United States Courthouse, 500 Camp Street, Room B305, New Orleans, Louisiana.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **NOTICE OF HEARING** on:

Josh Borsellino, Student Attorney
Karla Raettig
Tulane Environmental Law Clinic
6329 Freret Street
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Attorneys for the Plaintiff, by causing a full, true and correct copy thereof to be sent, on the date set forth below, by mailing in a sealed, first class postage prepaid envelope, addressed to the last known mailing address of the attorney and deposited with the United States Postal Service at Washington D.C.

DATED this 22nd day of June, 2004

Devon M. Lehman